FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-1589

GENERAL ELECTRIC COMPANY,
Petitioner,
v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.

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SUPPLEMENTAL BRIEF FOR PETITIONER, GENERAL ELECTRIC COMPANY, ON REARGUMENT

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General Electric Company ("GE") submits this supplemental brief on reargument principally to show that the Court's decision in *Washington* v. *Davis*, —— U.S. ——, 96 S.Ct. 2040 (No. 74-1492, decided June 7, 1976), does not control the disposition of this case, and to bring to the Court's attention certain statistical information, most of which was not available when GE filed its original brief in November 1975.

I. NEITHER THE RATIONALE NOR THE HOLDING OF *WASHINGTON* v. *DAVIS* SHOULD AFFECT THE DISPOSITION OF THIS CASE.

We anticipate that Petitioners Gilbert, et al., will argue that the Court's decision in *Washington* v. *Davis* has precedential significance in this case. For the reasons set forth below, such an argument, we submit, would have no merit.

A. The Court's Holding In *Geduldig* v. *Aiello* Forecloses The Applicability of *Washington* v. *Davis*.

GE maintained in its original brief, pp. 26-34, and here reiterates, that the exclusion of pregnancy-related disabilities from a temporary disability plan does not constitute sex-based discrimination, and that, accordingly, the sex discrimination interdiction of Title VII is here inapplicable. GE predicated this position on the Court's decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), wherein the Court stated (417 U.S. at 496-497):

> There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of aggregate risk protection derived by that group or class from the

> program. *There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not* [emphasis supplied; footnotes omitted].

and further that (417 U.S. at 496-497, n. 20):

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition —pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups —pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[1]

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[1] The matter of pregnancy exclusions from employer-sponsored disability plans is discussed at length in Larson, *Employment Discrimination*, § 38.00-38.21 (Matthew Bender, 1975) (hereinafter cited as "Larson")—a treatise which was not available when GE's original brief was filed with the Court. Professor Larson, who is James B. Duke Professor of Law at Duke University and former Under Secretary of Labor, states with respect to the Court's pronouncement in *Geduldig's* footnote 20 that the Court found that a pregnancy exclusion from a disability plan is not discrimination on the basis of sex (Larson, § 38-21, p. 8-25):

> What the Court is evidently struggling to convey is rather that pregnancy, while obviously gender-linked in that only one sex is capable of it, is such a special kind of

The Court in *Geduldig* did, however, warn (417 U.S. at 496-497, n. 20) that discrimination based on gender could indeed be present where there is "a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other"—a showing which, as we demonstrated in our original brief, pp. 53-61, cannot be sustained in this case.[2]

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disabling condition, with such "unique characteristics," that it does not necessarily have to be lumped with the usual array of illnesses and injuries covered by disability plans.

See also the following law review articles which appear to agree substantially with GE's interpretation of *Geduldig*: Note, *Pregnancy and Sex-Based Discrimination in Employment: A Post-Aiello Analysis*, 44 U. of Cinn. L. Rev. 57, 71 (1975) (hereinafter cited as "*A Post-Aiello Analysis*") (citing with approval the analysis of the dissenting opinion in *Communications Workers* v. *American Telephone and Telegraph Co.*, 513 F.2d 1024 (2d Cir. 1975): "The court's analysis of footnote 20 is correct. If there is no sex discrimination at all, Title VII does not apply to pregnancy . . . ."); Note, *Discrimination Against Pregnancy is not Sex Discrimination*, 1975 Brigham Young U. L. Rev. 171 (*Geduldig* interpreted to mean that "disparate treatment of pregnant persons vis à vis nonpregnant persons was not sex discrimination [footnote omtited]."); Note, *Sex Discrimination in Employee Fringe Benefits*, 17 Wm. & Mary L. Rev. 109, 123-129 (1975).

[2] GE submits that this Court's decision in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), is entirely consistent with its approach in *Geduldig* and, indeed, supportive of GE's view herein. Contrary to the analysis of several commentators (see, e.g., *A Post-Aiello Analysis*, *supra*, n. 1 at 73) and as previously noted by GE in its original brief at p. 30, n. 21, *Phillips* did not proscribe disparate treatment on the basis of a sex-unique characteristic and, to this extent, is distinguishable from the facts herein. For, although only women can be

The holding of *Geduldig*—that a pregnancy exclusion is not sex discrimination—is, we contend, dispositive of the statutory[3] issue presented in this case, i.e., whether GE's pregnancy exclusion constitutes sex discrimination within the meaning of Title VII.

In like manner, *Geduldig's* holding renders inapposite *Washington* v. *Davis's* constitutional inquiry and holding. *Washington* v. *Davis* involved the validity of a qualifying test given to applicants for positions

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mothers of pre-school age children, persons of either sex can be parents. Accordingly, while men and women may be similarly situated as parents (as they were in *Phillips*), pregnancy, as this Court recognized in *Geduldig*, is *sui generis*.

[3] It is arguable, we note, that on equal protection grounds, Congress may be constitutionally precluded from enacting a statutory provision which mandates that pregnancy-related disabilities be covered under an employee disability income protection plan. For such a provision would create a classification in favor of pregnant women, as against the class of nonpregnant persons (both men and women); and, as it would extend to a situation not involving sex discrimination, *Geduldig*, *supra*, thus arguably would not be rationally related to Title VII's purpose of eliminating sex discrimination concerning employment opportunities.

Moreover, it is also arguable that in view of the Court's decision in *Geduldig*, Congress may lack the power to compel a pregnancy *inclusion* insofar as the states are concerned. See the suggestion to this effect as set forth at pp. 22-23 of the Transcript of Oral Argument before the Court in *Fitzpatrick* v. *Bitzer*, —— U.S. ——, 96 S.Ct. 2666 (No. 75-251, decided June 25, 1976). If Congress is indeed thus restricted, and as Title VII now applies uniformly to states and private employers alike, see *Bitzer*, *supra*, 96 S.Ct. 2668, n. 2, the limitation on Congress's power on the basis of *Geduldig* would also extend to private employers.

as police officers by the District of Columbia Metropolitan Police Department. Plaintiffs alleged that the test was racially discriminatory in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. The allegtion was predicated, not on the ground that the test was intentionally or purposely designed to cause discrimination, but rather on the ground that the test had a substantially disparate impact on applicants who were Negroes and bore no relation to job performance. The District Court directed summary judgment for the defendant Police Department. 348 F. Supp. 15 (D.D.C. 1972).

The Court of Appeals reversed, holding that the statutory Title VII standards enunciated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), were controlling. The Court of Appeals declared that lack of discriminatory intent in designing and administering the test was irrelevant, and that a showing of disproportionate impact, of itself, was sufficient to establish a prima facie constitutional violation. This Court, in turn, reversed on the narrow basis that the Court of Appeals had erroneously "applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it. . . ." 96 S.Ct. at 2046. The Court emphasized that in the context of invidious race discrimination the constitutional standard and the statutory standard were not the same, saying (96 S.Ct. at 2047):

> . . . our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact [emphasis in original].

In addition, the Court held that the personnel test in question established "a racially neutral qualification for employment," 96 S.Ct. at 2050, and that on the facts of the case the disproportionate impact that the test had on Negro applicants did not warrant the conclusion that the test was "a purposeful device" to discriminate against Negroes, 96 S.Ct. at 2051. The Court further held that the personnel test complied with all applicable statutory requirements, including those obtaining under Title VII, in that the test was directly related to the police training course regimen. 96 S.Ct. at 2052-2054.

In sum, the crux of GE's position here is that *Geduldig* makes clear that, irrespective of whether Title VII or constitutional standards of construction are applied, the exclusion of pregnancy from temporary disability programs is not sex discrimination, absent a showing of pretext intended to bring about invidious sex discrimination.[4] Accordingly, the constitutional-statutory distinction drawn by the Court in *Washington* v. *Davis* has no relevance whatever to this case. For whether the constitutional standard is a narrow one of purpose and whether

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[4] At page 31 of our original brief, we thus phrased the point:

> As Judge Widener noted in his dissent below (Supp. Br. Jt. Pet. 12a-13a), because *Geduldig* establishes that a pregnancy exclusion is not sex discrimination, it is irrelevant whether or not Title VII has a broader sweep than does the equal protection clause.

To be sure, we then went on to argue (Original Br. 32-33) based on the now-overruled language of the Court of Appeals in *Davis* v. *Washington*, 512 F.2d 956, 958, n. 2 (D.C. Cir. 1975), and other cited authorities, that the constitutional and Title VII standards of construction are the same.

the Title VII standard is the broader one of effect (disproportionate impact), the question of which standard is applicable and controlling in this case need never be addressed. Thus, the premise of *Geduldig*—that discrimination based on gender does not result from the pregnancy exclusion with which this case is concerned—renders irrelevant all questions and arguments pertaining to the applicable standards of construction either under the Constitution or under Title VII, including specifically the contention of plaintiffs Gilbert, et al., as phrased by the Solicitor General, that under Title VII a practice which is neutral on its face and is neither irrational nor a pretext for discrimination is nevertheless discriminatory if it has a substantial disparate effect on a protected class. See p. 20 of *Amicus Curiae* brief filed by the Solicitor General in this case.[5]

[5] The Solicitor General's position in this case is that *Geduldig* is not controlling, and that GE's pregnancy exclusion constitutes a prima facie violation of Title VII. Sol. Gen. Br. 19-22. Significantly, however, Deputy Solicitor General Lawrence G. Wallace appears to disagree with the Solicitor General's position. Thus, in the course of the oral argument on April 21, 1976, in *Fitzpatrick* v. *Bitzer, supra*, 96 S.Ct. 2666, Mr. Wallace stated to the Court (Tr. of Oral Argument, pp. 22-23):

> MR. WALLACE: Now, this type of complaint [in *Bitzer*] seems to us to be very dissimilar to the situation that was before the Court in the case adverted to yesterday, *Geduldig* v. *Iello* [sic] in 417 U.S. at page 484. There both males and femals [sic] had identical coverage for the disabilities that were covered by the insurance program, and the case presented the more complex question of whether the failure to include pregnancy among the disabilities covered constituted a discrimination on the basis of sex.

[Footnote continued on page 9]

[5] [Continued]

> And in holding that it did not, the Court pointed out, in Footnote 20 of that opinion, the dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed* and *Frontiero* v. *Richardson*, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender, but merely removes one physical condition, pregnancy, from the list of compensable disabilities.
>
> QUESTION: Mr. Wallace, do you think Congress could now say that, under Section 5 of the Fourteenth Amendment, California could not employ the type of health benefit program that was held to be constitutional in *Geduldig?*
>
> MR. WALLACE: Well, possibly so, but that would present a *Katzenbach* v. *Morgan* type of question, which—
>
> QUESTION: Or *Oregon* v. *Mitchell?*
>
> MR. WALLACE: Or *Oregon* v. *Mitchell*, which in my view is not what's involved here. Because in order for *Geduldig* to be comparable to this case, you would have had to have a situation in *Geduldig* in which men and women were paid differently for appendicitis, even though they were, in all respects, identically situated with respect to the contributions they had made to the retirement program. And the cases adverted to in that Footnote 20 seem to me to be the comparable cases here.
>
> The complaint and the finding here fully fit the test which this Court set forth in *Reed* v. *Reed*, by providing dissimilar treatment for men and women who are thuse [sic] similarly situated. The challenged section violates the Equal Protection Clause.

In thus distinguishing *Geduldig* from *Bitzer* (which involved a Connecticut pension statute on its face discriminatory against males), Mr. Wallace appears not only to have been in accord with GE's position that the exclusion of pregnancy from disability coverage is not *per se* sex discrimination, but also, it is submitted, to have lessened the weight to be accorded the position set forth in the Solicitor General's earlier brief *Amicus Curiae* in this case.

B. The Testing Procedure Involved in *Washington* v. *Davis* Goes To The Essence Of Title VII, And Serves To Differentiate That Case.

Washington v. *Davis* is also distinguishable in that it was concerned with a testing procedure to which applicants for employment were forced to submit. As pointed out in our original brief, pp. 53-54, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429, makes clear that the provisions of Title VII are aimed essentially at practices, procedures and policies which serve to deny employment opportunities—i.e., jobs themselves, and job promotions; contrariwise, the provisions of Title VII are not targeted at personnel practices which do not relate to job opportunities, but are merely incidents of a job. (The pregnancy exclusion is, we submit, such an incidental personnel practice, the entire status of employment *benefits* under Title VII being "one of degree." [6] See *Dodge* v. *Giant*

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[6] The sickness and accident insurance which GE provides (from which pregnancy is excluded) is but one of the benefits that GE presently provides to all its employees. These benefits include the following:

PENSION PLAN

—Provides for normal, early and disability retirement income for all employees.

—Career average benefit formula with guaranteed minimum pension of up to $12 per month per year of service.

—10-year vesting.

INSURANCE PLAN

—Provides life insurance coverage to all employees of two times annual pay.

[Footnote continued on page 11]

[6] [Continued]

—Accidental death coverage of additional one times annual pay; plus coverage for accidental dismemberment.

—Comprehensive medical expense coverage for hospital, surgical, physician, nursing and other expenses in hospital, at home or elsewhere, for employee and dependents—lifetime maximum coverage $250,000.

—Weekly Sickness and Accident coverage of 60% of pay to a maximum of $150 per week for up to 26 weeks.

SAVINGS AND SECURITY PROGRAM

—Enables all employees to invest up to 7% of pay with Company matching payment of 50% of employee contribution.

PERSONAL ACCIDENT INSURANCE

—Enables any employee to purchase, at group rates, accidental death coverage of up to the higher of $500,000 or 5 times pay.

LONG TERM DISABILITY INSURANCE

—Enables any employee to provide, at group rates, income protection after Weekly Sickness and Accident coverage is completed, after 26 weeks, to age 65.

DEPENDENT LIFE INSURANCE

—Enables any employee to provide, at group rates, $5,000 life insurance coverage for the spouse and $1,000 for each dependent child.

INCOME EXTENSION AID PLAN

—Provides all employees with one week's pay for each year of service in the event of layoff or plant closing.

—Amount can be paid in a lump sum or used to supplement income to 60% of former pay while employee draws state UC benefits.

INDIVIDUAL DEVELOPMENT PROGRAM

—Provides employees with up to $400 per year of tuition reimbursement for approved work-related or career-related courses.

[Footnote continued on page 12]

[6] [Continued]

EMERGENCY AID PLAN

—Provides for employee and pensioner loans or grants of up to $500 in the event of financial emergency.

MEDICAL CARE PLAN FOR PENSIONERS

—Provided to all retirees with 10 years of service after Insurance Plan coverage ceases at age 65.

—Provides for hospital and surgical coverage up to $11,000 lifetime.

PENSIONERS' HOSPITAL INDEMNITY PLAN

—Enables retired employees over age 65 to provide additional hospitalization coverage at group rates of $20,000 for self and spouse.

VACATION PLAN

—Provides employees vacations with pay of one to six weeks depending on length of service.

HOLIDAYS

—10 paid holidays provided.

SICK AND PERSONAL PAY

—Provides two to five days of paid time per year to cover incidental absences.

DEATH IN FAMILY

—Provides three paid days for the death of covered relatives.

JURY AND WITNESS DUTY

—Provides the difference between GE pay and jury pay for all days spent on jury or witness duty.

MILITARY DUTY ALLOWANCE

—Provides for up to 17 days of pay differential for employees required to attend summer encampments.

—Provides one month's pay for employees entering active duty with the Armed Forces.

(See Plaintiffs' Exhibits 4-11, inclusive, which have not been reproduced in the printed Single Appendix.)

Foods, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973), discussed in our original brief at pp. 53-54.)[7] Thus it is important to note that the sole matter addressed in *Washington* v. *Davis* was a testing procedure that clearly impacted an important question concerning employment opportunities of applicants for police jobs, and that the case presented no question concerning peripheral job benefits or incidents such as the pregnancy benefit here involved.[8] Accordingly, to

[7] See also the following cases upholding employers' grooming standards against charges of sex discrimination: *Willingham* v. *Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975); *Fagan* v. *National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973); *Knott* v. *Missouri Pacific R. R. Co.*, 527 F.2d 1249 (8th Cir. 1975); *Baker* v. *California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *Earwood* v. *Continental Southeastern Lines, Inc.*, —— F.2d —— (4th Cir. 1976) (No. 75-2221, decided Aug. 25, 1976).

In *Willingham, supra*, at 1090, the Fifth Circuit cautioned that judicial temperance must be exercised in interpreting the Title VII sex discrimination proscription so as not to expand impermissibly the narrow statutory scope:

> We find the legislative history [regarding sex discrimination] inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.

[8] Commenting on the District Court's statement in this case (375 F. Supp. 367, 381; Jt. Pet. 29a) that ". . . under GE's policy the consequence of a female employee exercising her innate right to bear a child may well result in economic dis-

the extent that the Court's opinion in *Washington* v. *Davis* can be read as endorsing an "effects" test under Title VII, the opinion should also be read, narrowly, as one dealing with employment opportunities alone.

aster . . . . Thus, women are required to undergo the economic hardship of the disability which arises from their participation in the procreative experience," Professor Larson has said (Larson, § 38.21, pp. 8-29, 8-30):

> This type of argument . . . is appropriate and even decisive in the kind of case involving firing women for pregnancy without the option of unpaid leave, but it may be questioned whether it is in place in a discussion of fringe benefits. If the penalty for pregnancy is to be fired, it can well be argued that public policy is being seriously offended, since complete loss of a job means loss of the right to work and earn the basic means of subsistence. . . . But there is no such exalted constitutional or inherent right to be paid while temporarily not working, much less to be paid hospital and medical benefits, no matter what the reason for the nonworking status may be. As stated earlier, an employer would be completely within his rights if he provided no sick pay of any kind, as many still do not to this day. Such a policy could not be challenged as a disincentive to human survival. Procreation has managed to flourish satisfactorily quite apart from paid maternity leaves in the past. It is one thing to say to a female employee: there are two fundamental rights—to work and to procreate—but you cannot have them both. It is quite another thing to say: if you procreate, your right to work and to be paid while working and to get your job back will remain unimpaired, but you will not be paid during the weeks you are not working. In the former case a fundamental right, the right to work and earn, is at stake. In the latter case a fringe benefit is at stake, and the ponderous weight of the arguments based on the public policy recognizing the need for the human race to survive seems out of place [footnotes omitted].

C. The Racial Context Of *Washington* v. *Davis* Is A Further Distinguishing Factor.

That *Washington* v. *Davis* concerned a question of race, and not sex, discrimination is further reason for limiting the thrust of the Court's opinion therein. Thus, whether issues of constitutional interpretation or of statutory construction, or of both, were involved in the case, the fact that it did not involve sex discrimination is, we submit, an important distinction insofar as this case is concerned. In this regard, it is significant that a Court majority has never held that sex classifications are, like race classifications, inherently suspect. See *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Kahn* v. *Shevin*, 416 U.S. 351 (1974). Accordingly, to the extent that the opinion in *Washington* v. *Davis* can be read as approving a more stringent "effects" test under Title VII than is applicable under equal protection concepts, the opinion's thrust, we further submit, must be narrowed by the fact that it was concerned, not with discrimination on the basis of sex, but rather, and solely, with a matter of alleged racial, or suspect, discrimination. Thus limiting the "effects" pronouncement of *Washington* v. *Davis* (and indirectly, of course, of *Griggs* v. *Duke Power Co.*, *supra* [9]) to instances of racial discrimination is, we

[9] Reporting to the Annual Convention of the American Bar Association's Labor Law Section on the "Labor Law Decisions of the Supreme Court, 1975-76 Term," Professor Benjamin

submit, in accord with the "BFOQ" line drawn by Congress, for Title VII provides in Section 703(e)(1) that discrimination on the basis of religion, sex, or national origin is not illegal "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." Most significantly, however, such limitation is not paralleled by any limitation with respect to race.[10]

Aaron, in discussing *Washington* v. *Davis*, suggested that the latter case may presage a loosening of the *Griggs* standard. Professor Aaron said (92 LRR 311 at 334, August 16, 1976):

> On the other hand, Congress may not have fully appreciated, as the Court is belatedly beginning to understand, that the EEOC testing guidelines are so rigorous that literal compliance with them is virtually impossible. . . . [T]he readiness of the Court to grant certiorari in such a procedurally confused case [*Washington* v. *Davis*], suggests that the majority is uneasy about the exuberance of its rhetoric concerning testing in the *Griggs* and *Albemarle* [*Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975)] decisions and is disposed to loosen the required validation standards. If that is so, *Washington* presages a new round of litigation involving testing in private employment.
>
> Perhaps the Court will eventually conclude that the statutory standard should be no more rigorous than the constitutional standard elucidated in *Washington* . . . [italics added].

[10] Section 703(e) of Title VII, 42 U.S.C. 2000e-2(e), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

It follows from all of the foregoing reasons that *Washington* v. *Davis* is not a precedent affecting the disposition of this case.

II. RECENTLY PUBLISHED STATISTICAL MATERIALS FURTHER SUPPORT GE'S POSITION THAT THE ELIMINATION OF THE PREGNANCY EXCLUSION WOULD ACCENTUATE THE PRESENT INSURANCE COST IMBALANCE BETWEEN MALE AND FEMALE EMPLOYEES.

In our original brief, at pp. 55-61, we set forth the sound business considerations underlying the pregnancy exclusion in issue before the Court. These business considerations support GE's position that the payment of a pregnancy benefit would not be a rational and prudent use of benefit money. In this connection we pointed out that GE's female employees already receive a substantially greater proportion of sickness and accident benefits than do male employees, and that, accordingly, the inclusion of a pregnancy benefit would further heighten the existing imbalance. See GE's original brief, n. 5, p. 6; n. 62, p. 56. A report on the cost of sickness and accident insurance published subsequent to GE's sub-

mission of its original brief,[11] and a comparison of male-female mortality rates since 1910, further support GE's position.

A. New York State Insurance Department Study And Report

Recently, under date of June 1976, the New York State Department of Insurance reported the results of a study it conducted with respect to the respective costs to insurers of providing disability income insurance to males and females in the State of New York.[12] Data utilized in the compilation of the study was obtained from 21 insurance

[11] At the first oral argument in this case, the Chief Justice inquired as to whether the record herein contained information about "the ratio of disability insurance generally as between men and women." See p. 15 of the Transcript of Argument (January 19, 1976). The New York Insurance Department Study and Report commented upon in the text, *infra*, contains statistical information bearing on the Chief Justice's inquiry.

The Chief Justice also inquired about the comparative cost of life annuities for women as compared with men. Transcript of Argument, p. 11. The relative mortality experience of men and women adverted to in the text, *infra*, pp. 22-24, bears on the latter inquiry.

[12] Selected excerpts from the report are reproduced in Appendix A to this Supplemental Brief. Printed copies of the report, procured from the New York State Department of Insurance, have been lodged with the Clerk of the Court. References herein to the report are to Appendix A hereto, as "App. A hereto p. ——;" or to the report as printed, as "Report p. ——;" or to both.

An article in *The Wall Street Journal*, August 25, 1976, entitled "Insurance Fee Study Backs Higher Rates Charged To Women," discusses the study and report.

companies licensed by the State and included over 57,500 female claims for disability benefits (App. A hereto p. 10a; Report p. 31). The basic purpose of the study was to determine whether, and to what extent, sex is a factor in the cost of disability insurance; and, if sex is a cost factor, to determine if there are significant variations between female and male costs based on age, occupation, cause of disability, benefit structure, and type of renewal guarantee (App. A hereto p. 5a; Report pp. 2-3). In accordance with the historical insurance industry practice, the disability benefit programs analyzed in the study uniformly excluded pregnancy benefit coverage (Report pp. 6, 18, 27, 44-45, 46-47, 52, 53, 55).[13]

Among the conclusions of the Insurance Department are these (App. A hereto pp. 7a-8a; Report p. 27):

> 1. Sex is a major factor affecting the cost of disability income insurance.
> 2. For accident and sickness benefits, female claim costs are consistently higher than male claim costs up to age 60 after which they fall below male costs. The highest relative differential in claim costs appears in the age group 30-39.[14]
>
> * * * *

[13] The methodology underlying the study is meticulously set out in Appendices to the report—a fact which enhances the reliability of the study's results.

[14] The study showed that the female-male cost ratios are larger for nonhazardous occupations than for the hazardous occupations, which is a consequence of the fact that in the labor force as a whole a larger proportion of men are engaged

7. There is no evidence of significant change in female-male claim cost ratios during the years 1968-73, i.e., the ratios by sex and by age have remained relatively stable.
8. A review of social security disability benefit experience exhibits a pattern of claim cost ratios not inconsistent with those derived from commercial disability income insurance experience.[15]

As a result of its study, the Insurance Department is recommending that its Regulation 62 be amended to conform with the study's findings. Report p. 28. Among other matters, the latter regulation deals with formulas for developing premium charges for accident and health insurance, based in part upon claim costs. To arrive at annual claim costs for females, the Department recommends that male claim costs be multiplied by ratios determined by the study, as follows (App. A hereto pp. 8a-9a; Report p. 27):

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in hazardous occupations (App. A hereto p. 6a; Report pp. 24-25). Concerning this fact, the report states (App. A hereto p. 6a; Report pp. 25-26): "Comparing the experience of women with that of men on an aggregate unclassified basis with respect to occupation is similar to comparing the average risk of disability of five men: a teacher, an executive, a factory worker exposed to high risk, a telephone linesman, and a quarryman; with the average risk of disability of five women: a teacher, a technician, a secretary, a sales clerk, and a factory worker doing light assembly work at a bench."

[15] Concerning the social security disability benefit experience, the report concludes (App. A hereto p. 7a; Report p. 26): ". . . if it were possible to obtain truly homogeneous occupational groups so that the factor of occupation could be held constant, the female-male claim cost ratios by age disclosed by the social security data would be reasonably comparable to those disclosed by the Department study of commercial disability income insurance."

	Attained Age				
	20-29	30-39	40-49	50-59	60-69
Accident and Sickness Insurance	1.43	2.22	1.90	1.31	0.98

In sum, the Insurance Department study provides sound statistical evidence that the overall cost of disability benefits, which exclude pregnancy-related benefits, is significantly higher for females than that for males similarly situated. The study and report clearly is consistent with the record evidence herein that the cost per unit of benefit for a female employee under existing insurance coverage where no pregnancy benefit is provided is 170 percent of that for a male employee.[16] See GE's original brief, p. 57; II App. 536. Moreover, an application of the male-female claim cost ratios by age brackets (as set forth in the New York Insurance Department's Report) to GE's female employee complement as of December 31, 1975, shows an average claim cost ratio of 1.66 for such female group.[17] This is the same as saying

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[16] The 170 percent figure, according to the record evidence, would rise to 210 percent were a six weeks maternity benefit to be provided, and to 300-330 percent were full maternity coverage to be provided. See GE's original brief p. 58; II App. 536.

[17] We show in Appendix B hereto the statistics and methodology used in computing the 1.66 average claim cost ratio for GE female employees set forth in the text. As set forth in the latter Appendix, the computation is based on the number of GE female employees, in various age groups, as of December 31, 1975. These numbers, although not included in the record herein, reflect the most recent GE end-of-year employment figures; they are, moreover, substantially similar to those set forth in the record which pertain to GE employment as of December 31, 1971. See I App. 233, 236.

that on the average under the GE sickness and accident disability insurance plan (which, of course, excludes coverage for pregnancy), the female employees' coverage should be expected to cost 166 percent of the male employees' coverage on the basis of the New York Insurance Department recommended ratios.

B. Male-Female Mortality Experience.

An examination of the relative mortality experience of men and women in the United States since 1910 indicates that females are subject to a significantly different mortality hazard than are males. The table below sets forth at three typical ages the ratios of female mortality rates to male mortality rates taken from the U. S. Censuses of 1910, 1940, and 1970. The table shows that variations in male and female mortality experience existed in a significant degree in 1910, and that the difference has been widening rapidly over subsequent decades. Thus, for example, while female mortality at age 20 was about 7/8ths of male mortality in 1910 and about 3/4ths of male mortality in 1940, it is now only about 1/3rd of male mortality. The table further shows that similar dramatic changes have also occurred at other ages as well.

Ratio of Female Mortality to Male Mortality in U.S. Census Tables

Item	1910	1940	1970
	Age 20		
Male Rate	5.03[18]	2.46[20]	2.12[22]
Female Rate	4.35[19]	1.90[21]	.72[23]
Ratio	.86	.77	.34
	Age 40		
Male Rate	10.46[18]	5.95[20]	4.01[22]
Female Rate	8.25[19]	4.52[21]	2.33[23]
Ratio	.79	.76	.58
	Age 60		
Male Rate	31.04[18]	26.47[20]	23.39[22]
Female Rate	26.13[19]	18.37[21]	11.13[23]
Ratio	.84	.69	.48

The lower mortality rates for females mean that pension cost is considerably more for a female than for a male employee, although the exact relationship

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[18] Table 4 Life Table for Males 1910, pp. 58-59, U.S. Life Tables, J. W. Glover, Government Printing Office, Washington 1921.

[19] Table 6 Life Table for Females 1910, *Id.*, pp. 62-63.

[20] Table 2 Life Table for Total Males, pp. 28-29, Sixteenth Census of the U.S. 1940; U.S. Life Tables and Actuarial Tables by T.N.E. Greville, U.S. Government Printing Office, Washington 1946.

[21] Table 3 Life Table for Total Females, *Id.*, pp. 30-31.

[22] Table 2 Life Table for Males, pp. 8-9, Vol. 1, U.S. Life Tables 1969-71, DHEW Publication No. (HRA) 75-1150.

[23] Table 3 Life Table for Females, *Id.*, pp. 10-11.

depends in part on the rate of interest used. Thus at 5 percent interest and at typical employee ages, it costs approximately 25 percent more to provide a female employee with a given level of pension benefit than it does for a male employee. Of course, the lower mortality for females also means that the cost of providing group life insurance for female employees is less than for male employees since fewer females can be expected to die in the course of a given year. Total costs for group life insurance programs, however, average only 1/10th to 2/10ths the cost of company pension plans,[24] so that the cost savings in the case of life insurance programs are relatively small.

We submit that although substantial differences by sex in pension and life insurance costs may not appear to have a significant bearing on the cost of disability insurance, the fact that there is a substantial body of incontrovertible evidence showing, for so long a period of time, a significant difference in mortality rates between men and women means that the selection of sex as a distinguishing factor for costing purposes cannot be ascribed to mere sexism or whimsey. The statistical evidence is simply too all-pervasive and the differences too great to ignore.

In sum, the statistical material set forth above fully substantiates the information we have previously supplied to the Court to the effect that the overall cost of providing disability benefits to females, as a group, is significantly greater than that for male employees. Further the substantial differ-

[24] Study: "Employee Benefits 1973," Chamber of Commerce of the United States, Tables 4 and 13, pp. 8, 18.

ences in disability rates between the sexes, together with the differences in mortality rates, provide ample rational justification for considering sex as an operative factor in the claim costs that should be expected to emerge from a given benefit program. Thus, with total disability costs already greater for female employees, any requirement to add disability benefits for pregnancy (clearly sex-biased so far as claim costs are concerned) would necessarily increase the existing cost differentials between male and female employees.

III. THE ESTABLISHED INSURANCE INDUSTRY PRACTICE SHOULD NOT BE OVERTURNED ON THE BASIS OF AN UNCLEAR STATUTORY DIRECTIVE AND A VACILLATING EEOC POSITION.

It is uncontroverted that when, prior to its enactment in 1964, Title VII was being considered by Congress, the prevailing insurance industry practice with regard to temporary disability plans was to exclude pregnancy-related disabilities from coverage.[25] This practice is based upon a basic insurance

[25] As set forth in GE's original brief, pp. 7-8, only approximately 40 percent of the work force in the United States under age 55, or some 32,000,000 employees, are covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 percent of the plans provide for 13 weeks benefit coverage; 50 percent provide coverage for 26 weeks; and only 5 percent provide coverage for 52 weeks. Only 40 percent of these plans, covering about 12,800,000 employees, provide a pregnancy benefit, and such coverage is almost always limited to six weeks (II App. 528-529; GE Exh. 42; III App. 846-847).

Moreover, sickness and accident policies written for individuals always exclude pregnancy from coverage (II App. 528).

principle—that insurance protects against the unexpected, and not against happenings which are within the control of the insured, such as childbirth and suicide. See II App. 526-527, 546-547. GE's temporary disability plan is based upon the standard insurance industry practice which historically, and currently, does not pay benefits for absences resulting from pregnancy.[26]

At pages 35-37 of our original brief, we commented upon the absence of interpretive legislative history concerning the meaning of Title VII's sex discrimination prohibition.[27] As noted, if there is anything of significance in that history, it is the statement of Senator Humphrey, the effective manager of the pending Senate bill, explaining the Bennett Amendment [28] to the Senate bill (now part of Sec. 703(h) of Title VII, 42 U.S.C. Sec. 2000e-2(h)), the purpose of which was to avoid conflicts between the sex discrimination prohibition of Title VII and the Equal Pay Act. In this regard, Senator Humphrey stressed that the latter prohibition would not repeal sex-based differentials in existing employee benefit plans, saying: [29]

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[26] Thus, during the trial, Mr. Hilbert, Labor Relations Counsel for GE, testified that the GE disability benefits program was structured according to standard insurance practice which traditionally has excluded pregnancy (II App. 595). See also, GE's original brief, p. 57.

[27] The more significant subsequent congressional legislative history underlying the proposed Equal Rights Amendment is discussed at pp. 37-41 of GE's original brief.

[28] See 110 Cong. Rec. 13647 (1964).

[29] 110 Cong. Rec. 13663-13664 (1964).

> . . . differences of treatment in industrial benefit plans including earlier retirement options for women, may continue in operation under this bill if it becomes law.

Senator Humphrey's statement shows, we submit, that Congress was aware when it enacted Title VII that it was the current industry practice to treat men and women differently in the pension benefits area, and that Congress, by its failure to express its disapproval, approved the practice. That Congress approved the "differences of treatment" with respect to pension benefits of which Senator Humphrey spoke, is, we urge, compelling reason why this Court should not now, in the absence of an express legislative direction, declare that the failure to treat pregnancy as a compensable disability constitutes sex discrimination within Title VII's meaning. For, the holding of *Geduldig*, *supra*, aside, to the extent that the latter exclusion may be said to result in a "difference of treatment" of men and women, that difference also obtains in the benefits area which only peripherally affects the employment relationship, and concerning which Congress, as shown, appears to have indicated that the sexes may be dealt with dissimilarly.

Although there is no explicit showing that when the EEOC first sanctioned the exclusion of pregnancy from disability insurance coverage in 1966 the Commission was then aware of the insurance industry practice concerning the exclusion, it is unlikely that its decision to sanction the exclusion was made without an inquiry into insurance practices.[30] Thus

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[30] At pages 13-15 and 42-53 of GE's original brief, the EEOC's historic and "waffling" position concerning the pregnancy exclusion is set forth and discussed.

Charles Duncan, the EEOC's General Counsel in 1965-1966, testified that the Commission's initial policy and position concerning the pregnancy exclusion was arrived at after thorough discussion and consideration (II App. 661).[31] As we have set forth (GE original brief pp. 13, 42), the EEOC's initial position sanctioning the pregnancy exclusion was continued for some six years until April 1972 when, without explanation or hearing, the EEOC suddenly reversed itself and announced that pregnancy was to be covered under disability insurance plans. We have also pointed out (GE original brief pp. 48-53) why, under these circumstances, no weight should be given to the EEOC's current interpretative guideline.[32]

[31] Mr. Duncan's testimony on the matter is as follows (II App. 661):

> Q. Now, how thoroughly was this matter discussed within the Commission? A. I would have to answer you this way. The whole question of sex discrimination occupied a good deal of the Commission's attention during the first year.
>
> Pregnancy, maternity leave was one aspect of the sex discrimination.
>
> It was also one of the problems that I think baffled the Commission the most. So I would say that this aspect of sex discrimination certainly as well as the broader problem of other aspects of sex discrimination were thoroughly discussed by the Commission.

[32] Professor Larson has pointed out that the current EEOC guideline regarding pregnancy reflects an unrealistic notion concerning collective bargaining and the cost of employee benefits (Larson, § 38.21, pp. 8-32, 8-33):

> To a person familiar with the everyday realities of fringe benefit plans in modern industrial society, the

Significantly, the EEOC's status as interpreter of Federal equal employment opportunity law has recently been called into question again—this time by the action of other Federal agencies. Thus, with respect to two matters considered in 1976 by the Equal Employment Opportunity Coordinating Council ("the EEOCC")[33] the EEOC's position has twice been re-

> EEOC rule and the court opinions embracing it have a sort of "never-never-land" quality about them. They all seem to begin with a mental picture of an employer who unilaterally and arbitrarily makes a sexist decision to withhold maternity benefits from female employees. This, of course, is not what happens at all. Instead, in any typical contemporary labor setting, what happens is that the unions and the employer, by hard bargaining, arrive at an agreed "package" of wage and fringe benefits. At some point in the negotiations it may be agreed that the new contract will include wage and fringe benefits equivalent to, say, a dollar an hour. The next question is how that dollar is to be spread around. . . . [P]rivate negotiators of a fringe benefit plan also begin with a fixed available resource within which, since it cannot possibly provide all possible desirable benefits, priorities have to be established. In other words, the decision on how to divide up the one dollar increase in the private negotiation is essentially the same as the decision on how to divide up the one percent payroll tax [as was present in *Geduldig*].

Similar views were expressed in GE's original brief, pp. 55, 67.

[33] The EEOCC, which is composed of the Department of Labor, the EEOC, the Civil Rights Commission, the Civil Service Commission, and the Department of Justice, is charged by law (Sec. 715 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-14) to eliminate inconsistency among the operations of the agencies and departments responsible for enforcement of the Federal equal employment opportunity law.

jected publicly by the other Council members. In the first instance, the EEOC disagreed with the view of all other Council members concerning the substance of a draft dealing with uniform guidelines on employee selection procedures (testing), and voiced the sole agency opposition to the publication of the draft for comment.[34] In the second instance, the EEOC again disagreed with the other Council members, and on this occasion with the Department of Health, Education and Welfare as well, concerning the scope of a recommendation to the President regarding the equalization of periodic pension benefits for men and women. All agencies, including the EEOC, were in agreement that the benefits should be equalized;[35] but the EEOC, in disagreement with the others and relying on its own interpretation of Title VII, asserted that the equalization should extend to joint and survivor options as well.[36]

Finally, we point out that Congress has shown itself wary of agency regulation which overturns well-

[34] See 41 Fed. Reg. 29016 (July 14, 1976); 92 LRR 186-187; BNA, *Daily Labor Report*, No. 121, p. A-18 (June 22, 1976).

[35] Significantly, the Council's recommendation was that equalization be achieved through the enactment of new legislation "[b]ecause Congress has not made this position completely clear in existing statutes." So here, in view of the lack of clarity as to Title VII's meaning, the goal of Petitioners Gilbert, et al., it is submitted, should be sought through congressional, and not judicial, action.

[36] See BNA, *Daily Labor Report*, No. 122, pp. A16-17, E1-3 (June 23, 1976); BNA *Pension Reporter*, No. 85, p. A-18 (May 10, 1976).

established custom under the guise of achieving equality between the sexes. On August 26, 1976, the Senat voted, 88-0, further to amend the sex discrimination provisions of Title IX of Pub. L. 92-318, as amended, 20 U.S.C. §§ 1681, *et seq.*, to exempt fatherson or mother-daughter activities sponsored by an educational institution from Title IX's coverage. 122 Cong. Rec. 14643-14652 (daily ed. August 26, 1976). The amendment was in swift and direct response to an HEW guideline which banned such activities as sexually discriminatory. In the course of the debate on the matter, Senator Dole said the amendment was "necessary to express the sense of Congress that these traditional activities be allowed to continue without becoming embroiled in further disputes with a well-meaning, but over-zealous bureaucracy . . ." (*Id.* at 14644); and Senator Thurmond said, "[i]f it were not for the misguided and senseless application of these regulations, Congress would not have to concern itself with this corrective legislation" (*Id.* at 14644).[37]

We respectfully urge the Court to be equally wary in upsetting the established insurance industry practice of excluding pregnancy from coverage under disability insurance plans.

[37] A summary of the action on this Senate amendment was reported in *The Washington Post* on August 27, 1976.

CONCLUSION

For the foregoing reasons and for all the reasons set forth in our original brief, we again urge that the judgment of the court below be reversed.

Respectfully submitted,

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Dated: September 15, 1976

APPENDICES

APPENDIX A

State of New York
Insurance Department

DISABILITY INCOME INSURANCE COST DIFFERENTIALS BETWEEN MEN AND WOMEN

[Emblem]

June 1976

THOMAS A. HARNETT
Superintendent of Insurance

[1] INTRODUCTION

Traditionally insurance companies have charged higher premium rates to women than to men for medical and hospital coverage and for disability income insurance. In addition to premium rate differentials, insurance companies have applied, in the past, more restrictive underwriting requirements for female applicants for insurance than for male applicants, particularly for disability income insurance. Underwriting restrictions applicable to women have included refusal to issue coverage in certain occupations, limitations on the amount of coverage and offering more limited types of insurance plans.

These restrictions prevented many women from obtaining the disability income coverage they desired and clearly represented unfair discrimination by insurers on the basis of sex. Discriminatory treatment of women with regard to the availability of disability income insurance prompted legal action in early 1974 by some women directly affected by such discrimination. A lawsuit was filed against the Superintendent of Insurance, requesting certain declaratory and injunctive relief to eliminate alleged sex discrimination in both the underwriting and rating of disability income insurance.

While this lawsuit was pending, in November 1974 the Insurance Department cited all insurers licensed to do business in New York to appear at a public hearing to show cause why the Superintendent should not:

1. make a written report concluding that any underwriting practice based on sex constitutes an unfair act or practice in the conduct of the business of insurance in the state; and
2. adopt and promulgate a regulation which would prohibit such sex discrimination.

Following the public hearing, the Insurance Department issued an *Opinion and Decision* and promulgated Regulation No. 75 on January 28, 1975. The *Opinion and Decision* concluded that unfair underwriting practices existed. The Regulation prohibited all insurers, effective June 1, 1975, from refusing to issue any policy, declining to renew or cancelling a policy because of the sex of the applicant or policyholder. In effect, no insurer licensed to do business in this State could thereafter offer or renew a policy to men that they did not offer or renew to women.

During the Legislative Session last year, Section 40-e was added to the New York Insurance Law as follows:

[2] § 40-e. Discrimination because of sex or marital status.

No association, corporation, firm, fund, individual, group, order, organization, society or trust shall refuse to issue any policy of insurance, or shall cancel or decline to renew such policy because of the sex or marital status of the applicant or policyholder.

Section 40-e, which became effective September 1, 1975, had the effect of expanding the Regulation so that in addition to the prohibition of sex discrimination, there is a prohibition of discrimination on the basis of marital status.

It should be noted that the Department Regulation and Section 40-e did not relate to the issue of premium rates to be charged for men and women for various types of insurance. In the *Opinion and Decision*, issued with Regulation 75, the Department committed itself to an in-depth review of available statistical data in an effort to determine if valid actuarial data existed to support different rates for men and women, and, if not, to compile up-dated data with respect to accident and health claim cost experience.

Credible statistical data already existed in hospital and medical insurance coverage. However, for individual disability income insurance, the available experience data on insured lives by sex was limited and often inconclusive. The scarcity of claims experience data on disability income insurance coverage for women can in part be attributed to the past reluctance or refusal of insurers to sell this type of coverage to women. In addition, a compilation of experience data from all of the major writers of disability income insurance coverage in New York State had never been attempted and thus a considerable volume of credible experience, while available in company records, had never been compiled and analyzed. Studies based on limited samples had appeared in actuarial journals.

It was also apparent that an up-dated study was essential because of the changing life style of women in the recent decades. More women have been pursuing professional and other careers on a permanent basis and an increasing number of women have become the sole or principal family wage earners, underscoring their need for adequate loss of income protection. As a consequence, their insurance needs are becoming more comparable to those of men.

In May 1975, the Insurance Department issued a call for the available disability income experience from 26 leading companies licensed to write this coverage in New York State. The objectives of the Department's study are:

[3] 1. To determine if sex is a factor in the cost of disability income insurance.

2. If sex is a factor, to determine to what extent this one characteristic affects the cost of disability income insurance as between otherwise similar risks.

3. If sex is a factor, to determine if there are significant variations in the female to male costs because of age, occupation, cause of disability (accident or sickness), benefit structure (elimination period and maximum benefit period), and type of renewal guarantee (guaranteed renewable to age 60 or 65 or renewable at option of the insurance company).

4. To determine if the influence of the sex factor on the cost of disability income insurance has changed during a recent six-year period (1968-1973).

5. To compare cost patterns by sex as determined by this study of individually underwritten disability income insurance with patterns exhibited by other related health statistics.

* * * *

[24] If the female-male claim cost ratios for all occupations (Table 11)* are compared with the ratios for non-hazardous occupations (Table 12)* it is apparent that the ratios are larger for the non-hazardous occupations, a consequence of the fact that in the labor force as a whole (as reflected by Table 11), a larger proportion of [25] men are engaged in hazardous occupations, thereby bringing their claim costs up relative to female claim costs, at all ages.

Comparing the experience of women with that of men on an aggregate unclassified basis with respect to occupation is similar to comparing the average risk of disability of five men: a teacher, an executive, a factory worker exposed to high risk, a telephone linesman, and a quarryman; with the average risk of disability of five women: a [26] teacher, a technician, a secretary, a sales clerk, and a factory worker doing light assembly work at a bench. The Department's analysis of insurance data and of the social security data, insofar as available occupational subdivisions permitted, indicate that when men and women in occupations of equal risk are compared, a higher incidence of disability is evident among women, especially at ages 30-50.

* * * *

It was not feasible to match claims with exposures in occupations other than those included among either "non-hazardous" or "hazardous." The remaining occupations were therefore grouped together in an "all other" category. For men, the "all other" claim costs lie between the non-hazardous and the hazardous in every age group as would be expected (see Appendix

* Tables and graphs omitted.

M). For women, however, the "all other" category produced higher claim costs than either of the other two groupings except for age groups 50-54 and 60-64. This confirms the above conclusion that women in hazardous industries are generally doing non-hazardous work.

All of this evidence suggests that if it were possible to obtain truly homogeneous occupational groups so that the factor of occupation could be held constant, the female-male claim cost ratios by age disclosed by the social security data would be reasonably comparable to those disclosed by the Department study of commercial disability income insurance.

* * * *

[27]

CONCLUSIONS

1. Sex is a major factor affecting the cost of disability income insurance.
2. For accident and sickness benefits, female claim costs are consistently higher than male claim costs up to age 60 after which they fall below male costs. The highest relative differential in claim costs appears in the age group 30-39.
3. For accident-only benefits, female claim costs are generally less than male claim costs below age 30 and show ratios which increase with advancing age. Thus, cause of disability affects claim-cost ratios.
4. Where reliable homogeneous occupational data are available, differences between occupations reflect differences in degree of hazard and therefore affect costs.

5. Where male and female workers are properly grouped in the same occupation class, claim-cost differentials are attributable to sex and age and not to occupation.

6. Benefit structure features such as elimination periods and maximum benefit periods or type of renewal guarantee provision (such as guaranteed renewable or optionally renewable by the company), while they affect claim costs overall, are not significant factors affecting relative female to male costs.

7. There is no evidence of significant change in female-male claim cost ratios during the years 1968-1973; *i.e.*, the ratios by sex and by age have remained relatively stable.

8. A review of social security disability benefit experience exhibits a pattern of claim cost ratios not inconsistent with those derived from commercial disability income insurance experience.

GENERAL RECOMMENDATIONS

Annual Claim Costs for Accident and Sickness Benefits

Annual claim costs for accident and sickness benefits with the same elimination periods should first be calculated for men. To arrive at the annual female claim costs, the male claim cost should be multiplied by the individual ratios presented in Table 1 of this study as follows:

	Attained Age				
	20-29	30-39	40-49	50-59	60-69
Accident and Sickness Insurance[a]	1.43	2.22	1.90	1.31	0.98

[a] Elimination period same for accidents as for sickness. Maternity excluded.

* * * *

[31]

Appendix A

CONTRIBUTING COMPANIES AND NUMBER OF FEMALE CLAIMS

Company	Number of Female Claims
Bankers Life Company	577
Continental Assurance Company	232
Continental Casualty Company	378
Continental Insurance Company	28
Guardian Life Insurance Company of America	190
John Hancock Mutual Life Insurance Company	2,768
Loyal Protective Life Insurance Company	1,341
Massachusetts Casualty Insurance Company	358
Massachusetts Indemnity and Life Insurance Company	924
Metropolitan Life Insurance Company	4,164
Monarch Life Insurance Company	1,883
Mutual Life Insurance Company of New York	2,414
Mutual of Omaha Insurance Company	14,313
New York Life Insurance Company	3,909
Paul Revere Life Insurance Company	8,418
Provident Life and Casualty Insurance Company	953
Provident Mutual Life Insurance Company of Philadelphia	142
Prudential Insurance Company of America	5,711
State Mutual Life Assurance Company of America	536
Travelers Insurance Company	7,838
Union Mutual Life Insurance Company	464
Total	57,541

APPENDIX B

Table I

General Electric Female Employment in Certain Age Groupings as of December 31, 1975

Age Group	Female Hourly *	Female Salaried *	Total Female	Percentage
20-24	5,394	3,251	—	
25-29	6,788	5,070	—	
Total 20-29			20,503	24%
30-34	6,130	3,126	—	
35-39	5,775	2,946	—	
Total 30-39			17,977	21
40-44	6,466	3,100	—	
45-49	7,455	3,619	—	
Total 40-49			20,640	24
50-54	8,319	4,260	—	
55-59	6,425	3,086	—	
Total 50-59			22,090	26
60-64	2,678	1,408	—	
65-69	138	124	—	
Total 60-69			4,348	5
Grand Total	55,568	29,990	85,558	100%

* Source: Summary of Certain Valuation Statistics by Age Group from Official Actuarial Valuation of G.E. Pension Plan as of 12/31/75.

Note: 149 hourly and 100 salaried listed as under 20 excluded from totals above since N.Y. Study had no "under 20" classifications. Thus of 85,817 total G.E. female employees, 85,558 were in age brackets as above or 99.7% of total female employment.

Table II

Computation of Weighted Average Claim Cost

Attained Age	Ratio from N.Y. Study	Proportion of G.E. Females	Corresponding Male Claims (2) x (3)
(1)	(2)	(3)	(4)
20-29	1.43	.24	.3432
30-39	2.22	.21	.4662
40-49	1.90	.24	.4560
50-59	1.31	.26	.3406
60-69	0.98	.05	.0490
Total	N.A.	1.00	1.6550

Weighted Average = 1.6550 rounded to 166%